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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 268

GLADYS HILDRETH,
Petitioner,
vs.
UNION NEWS COMPANY, a New York corporation,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	1-2
Questions Presented	2
Constitutional Provisions and Statutes	3
Statement of the Case	3-8
Counter-Statement of Facts	3-8
Argument	9-17
I. The Court of Appeals did not exceed its authority under the Seventh Amendment to the United States Constitution and did not deprive petitioner of her right to jury trial	9-13
II. The Court of Appeals did not decide a federal question in conflict with the decisions of this Court	14-15
III. The Court of Appeals decided the matter of state law in accordance with the law of this state	15-17
Summary-Conclusion	18

INDEX TO AUTHORITIES CITED

Cases

Cor. ℄ v. Ford Motor Company, 349 Mich. 108	15-16
Elgin, Joliet & Western Railway Co. v. Burley, 325 U.S. 711, 761, 89 L. Ed. 1886	14
Ford Motor Co. v. Huffman, 345 U.S. 330, 337-339 (73 S. Ct. 681, 97 L. Ed. 1048)	16-17
Galloway v. United States, 319 U.S. 372, 87 L. Ed. 1458	13
Hartley v. Brotherhood, 283 Mich. 201	15
Hildreth v. Union News Company, 315 F. 2d 548, C.A. 6th	4

Cases (continued) Page

Hofman v. Industrial Stamping and Mfg. Co., 334 Mich. 235 15
Knight-Morley Corporation v. Employment Security Comm., 350 Mich. 397 16
Lynas v. Maxwell Farms, 279 Mich. 684 16
Ryan v. New York Central R.R. Co., 267 Mich. 202 15
Union News Company v. Hildreth, 295 F. 2d 658, C.A. 6th 4
Zdero v. Brigge Mfg. Co., 338 Mich. 549 15

Statute

Labor Management Relations Act of 1947, Section 9(a), as amended, 29 U.S.C.A. 159(a) 3

Rules

Rule 50, Federal Rules of Civil Procedure 13

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OPINIONS BELOW

Petitioner's Appendix A, 4a to 18a, does not contain the full opinion of the Court of Appeals upon the first appeal, *Union News Company v. Gladys Hildreth*, reported in 295 F. 2d pages 658 to 667. Petitioner's appendix omits the last paragraph of that opinion, which reads as follows:

> "[9] No motion for judgment notwithstanding the verdict was made by the defendant-appellant

and this court is, therefore, limited upon reversal to granting of a new trial. *Cone v. West Virginia Pulp. & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752, 91 L.Ed. 849. The judgment of the district court is reversed and a new trial ordered."

QUESTIONS PRESENTED

Respondent does not believe that the questions presented by petitioner are relevant here and passes the same without comment except to say that the questions are suggestive of what should be regarded as an ineffectual attempt to bring about a rehearing or reversal of the first appeal to the Court of Appeals (docket No. 14224), reported in 295 F. 2d. 658.

Respondent believes that the questions presented here are as follows:

(1) Did the union, as petitioner's statutory bargaining representative, have the right to agree with respondent-employer that the layoff and discharge of petitioner-employee was for just cause and not in violation of the terms of the collective bargaining agreement?

(2) Where there is no material difference in the evidence introduced at the last two trials of this cause and the basic facts are not in dispute, did the Court of Appeals err in following its first opinion as the law of the case in passing upon the second appeal?

(3) Did the Court of Appeals err in adhering to its previous opinion and applying the law of the case in affirming the judgment of the District Court directing a verdict of no cause for action?

CONSTITUTIONAL PROVISIONS AND STATUTES

It is respondent's position that of the constitutional provisions and statutes cited by petitioner, only Section 9(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. 159(a) is material to the Court's consideration.

STATEMENT OF THE CASE

Counter-Statement of Facts

Respondent does not accept petitioner's statement because of inaccuracies and omissions therein.

Petitioner commenced suit on July 11, 1958, to recover damages for termination of her employment alleged to have been without just cause and in breach of the terms of a collective bargaining agreement dated the 15th day of October 1957, between respondent as employer and Hotel and Restaurant Employees Union, Local 705, as petitioner's statutory collective bargaining representative and agent. Further remedy sought by petitioner "that defendant may be ordered to meet with plaintiff for the purpose of processing her grievance out of her wrongful discharge as provided by 29 U.S.C.A. Sec. 159" was abandoned at a pre-trial hearing (stipulation filed January 4, 1960) and was not pursued in the second or third trials of this cause.

The first trial of this cause in the District Court in 1959 resulted in verdict and judgment of no cause for action. A new trial was ordered and held in 1960, which resulted

in verdict and judgment in favor of petitioner. Respondent appealed, and on October 2, 1961 (amended November 9, 1961), the Court of Appeals reversed the judgment of the lower court and ordered a new trial (Docket No. 1424, 295 F. 2d 658). New trial resulted after the conclusion of all the evidence in a directed verdict in favor of respondent of no cause for action. Judgment was entered accordingly on May 9, 1962 (21a-22a). Petitioner appealed on the theory that the District Court erred in following the prior opinion of the Court of Appeals and in granting defendant's motion for a directed verdict. The Court of Appeals affirmed the judgment of the lower court April 12, 1963 (Docket No. 15098, 315 F. 2d 548 (A, 1a-4a).

The facts in this case are fully stated in *Union News Company v. Hildreth*, 295 F. 2d 658, C.A. 6th, and are again summarized in *Hildreth v. Union News Company*, 315 F. 2d 548 C.A. 6th. Respondent relies upon the facts so stated and will only enlarge upon the same without intended repetition. In support of such facts, reference will be made to petitioner's appendix filed in Court of Appeals, Docket No. 15098, with page number preceding "a" and to respondent's appendix with page number preceding "b".

George Hlores, a seasoned employee of respondent, came to the soda fountain operation, which was entirely distinct from the restaurant operation at the Michigan Central Station, in the early spring of 1957. He issued continuous instructions to the employees at the counter and soda fountains, including petitioner, in writing and orally, in addition to posting prices of food, drinks and so forth for sale at the counter (32a, 43a, 5b). Principal among these instructions was that the counter girls should collect from the customer when served and ring up the amount of all sales immediately on their respective cash registers (32a, 5b).

there being two registers, one for each girl on a given shift. The counter girls were allowed to receive tips which were supposed to be placed in separate tip boxes (5b). Readings and tapes from each register were posted in permanent company records at the end of each shift (Form 291, Exhibits G, H, I, 40a, 41a).

Hleros, immediately after the assumption of his managerial duties, discovered that the operational figures pertaining to counter and soda fountain were bad. He testified that in the food industry such as this the food cost is the most important consideration (5b, 6b); that the percentage figures showed the ratio of the cost of merchandise only to the receipts from the sale of merchandise, and that no other items of expense, such as rent, utilities, payroll, and so forth were considered (33a, 6b). The same conception as to food costs and the basic importance thereof was expressed by Carl Omar, respondent's superintendent (21b) and also by Thomas Wirtz, business representative of Local 705 (15b).

There was accord as to the significance and meaning of the high percentage figures pertaining to the food costs at the counter and fountain operation. Hleros testified that percentage figures over 40% showed a bad operation and indicated mainly two things—mishandling of cash and mishandling of food (42a, 9b); that these figures were under discussion between him and Mr. Wirtz (9b). Mr. Wirtz, after testifying that in the lunch counter business food costs provided the only scale of operation, and that it was basic that food costs should be within a certain range (15b), went on to state that bad operational figures would indicate that food was going out the back door, was being given away, or would indicate a mishandling of funds (20b). Omar testified that the food costs indicated a bad

operation owing to the fact that they were running over 40% (21b).

Respondent was put off in its request to the Union for a change of crew (6b) until its operational figures for February, 1958 became available. These figures were disastrous—a percentage figure of 44% (7b). Hloros got the attention of the Union through Mr. Wirtz, who examined the books and records of respondent and agreed that something had to be done (7b, 16b). The Union refused a change of the entire soda fountain and counter crew (52a, 70a), but proposed that respondent lay off five, or one-half, of the counter and fountain employees after a three-day lay-off notice, and that if the figures did not improve after a period of ten days to two weeks, the laid-off employees would be reinstated with back pay, but that if the figures did improve, the defendant could keep the new crew (replacement to be supplied by the Union) and those employees who had been laid off would be regarded as permanently separated (31a, 35a, 54a, 61a, 17b).

Respondent agreed to the proposal of the union, and pursuant to agreement, gave lay-off notice to five fountain and counter girls, including plaintiff, on March 11, 1958. The girls were laid off on March 14th, and replacements were provided by local 705 (17b). Immediately following lay off, plaintiff, accompanied by the other laid-off employees, went to the offices of Local 705. They were there referred by Mr. Wirtz to his immediate superior, who arranged for a meeting to be held at the Michigan Central Terminal between the laid-off employees and representatives of the union and of respondent company. The meeting, as scheduled, was held in Mr. Omar's office on March 24, 1958, and was attended by union representatives, the laid off employees and Messrs. Hloros and Omar (55a, 60a, 81a).

There the employees were informed by Mr. Omar that they were being discharged for the good of the company under Code 12, which provided for a change of crew without prejudice so that if they were unable to find work elsewhere, they would have no trouble in getting unemployment compensation (22b, 23b). It was stated that the company rules had been violated, and that the operation was bad (23b). No claim was made at this meeting that the discharge of plaintiff and the other employees was without just cause (81a). Wirtz verified what Omar had said, and stated that he had examined the company books and figures, which disclosed a bad operation which meant that they (laid-off employees) would have to be changed (8b). Mr. Wirtz' version of this meeting was that Omar informed the girls that they were being discharged under a procedural code number for just cause (55a). He also testified that the girls had previously been called to the office by Messrs. Omar and Hloros and told that they were going to be replaced (58a).

Following March 14, 1958, counter and fountain sales and percentage figures showed marked improvement (Respondent's Exhibits E and F, 101a-104a).

Copies of existing records kept by respondent in the usual course of business were offered and received in evidence at all the trials. These showed (Form 292) weekly sales and cost of merchandise (33a, 9b, 26b, 27b). This form also showed percentage figures of foodcosts for given months. Defendant's Exhibits C and D are carbon copies of records of purchases of food and drink items for counter and soda fountains (Form 133) for period November 29, 1957, through June, 1958. Defendant's Exhibits G, H and I are copies of summary of register of readings (Form 291) which were transmitted from the original cash regis-

fer tapes to this permanent record, covering the period from December 19, 1957, to May 12, 1958. These records were kept by respondent company in form dictated by long experience and were kept in the usual course of business. Counsel for petitioner stipulated as of December 29, 1959, to the authenticity of all exhibits introduced at the pretrial, including letters and carbon copies of letters between defendant and plaintiff's counsel, and of defendant's books, records, transcripts therefrom and summary sheets, subject only to objections of respective parties as to relevancy, materiality and competency.

Respondent denies petitioner's statement (pg. 8) that it knew of no conduct on the part of plaintiff or the other four women which warranted discharge. It is true that no specific charges of individual dishonesty were directed at any of the individual employees who were laid off. Respondent has always maintained the position disclosed in its answer and amended answers (8a-10a) and its affirmative defenses as pleaded.

ARGUMENT

For purposes of respondent's argument only, we will accept petitioner's reasons for granting writ and proceed to meet her arguments thereunder.

I.

THE COURT OF APPEALS DID NOT EXCEED ITS AUTHORITY UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DID NOT DEPRIVE PETITIONER OF HER RIGHT TO JURY TRIAL.

Petitioner has had three trials of her alleged cause of action. The first trial resulted in verdict and judgment of no cause for action. The District Court granted a new trial because of an apparent omission in his charge. The second trial resulted in a verdict in favor of the plaintiff which may well be accounted for by the refusal of the District Court to grant certain requests to charge, and, more particularly, by its charge that,

> "The essential elements of the plaintiff's claim which she must establish by preponderance of the evidence in order to establish the element of liability in this case on the part of the defendant under the law applicable to that element is as follows:
>
> "(1) That the plaintiff requested the union to process her grievance;
>
> "(2) That the union refused to process plaintiff's grievance, and in so doing acted arbitrarily or in bad faith or in collusion with the defendant employer; and
>
> "(3) That plaintiff was discharged."

(Defendant-appellants appendix, Docket No. 14224, 253a).

The foregoing was substantially repeated, (254a). The Court of Appeals found it unnecessary to pass upon respondent's claim in the first appeal that the giving of the above charge to the jury was error (11a).

The affirmance by the Court of Appeals (A. 4a) of the judgment of the District Court in the third trial that the action be dismissed on the merits (22a) is the only basis for petition for writ of certiorari here.

Petitioner is still dissatisfied with her day in court. She still talks of speculative inferences and possibilities and now takes the position that the Court of Appeals not only ignored undisputed facts, but misstated the facts in its opinion on the first appeal. Respondent finds this an untenable position in which it refuses to concur in any respect. The Court of Appeals in its first opinion, 295 F. 2d 658 at page 663, said:

> "... in our opinion there was no evidence from which a jury could find that in agreeing to lay off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the Union's and defendant's agents. We do not think that the inability of defendant to place individual responsibility for its difficulties on plaintiff impairs the validity of our conclusion in this regard, nor prevents the discharge of plaintiff and her fellow workers being 'for just cause'. An employer should not be foreclosed from applying a remedy to stop a continuing loss merely because it cannot identify and isolate the particular source, or sources, of such loss."

It said further,

> "It is our conclusion that, considering the statutory authority of the Union as the bargaining agent, the language of the collective bargaining agreement, *and the undisputed facts as to the good faith bargaining between the Union and defendant*, it was within the authority of the Union as bargaining agent to agree with defendant that there was just cause for plaintiff's discharge." (Emphasis supplied.)

In connection with the foregoing conclusion, the Court of Appeals pointed out, page 665:

> "Here the contract forbade discharge except for just cause. A condition arose which called for an interpretation of such clause. *The employer disclosed to the Union the facts which the company felt would constitute just cause for the discharge of some of its employees. After an investigation and appraisal of such facts, the bargaining agent agreed that such facts constituted just cause.*" (Emphasis supplied.)

The Court of Appeals had in mind the basic facts disclosed to the union which the respondent company claimed would constitute just cause for discharge and not the possibilities and matters of conjecture and second guessing as to how respondent's business should be run which the petitioner has been able to conjure up in the last five years. The basic facts which the bargaining parties had in mind, concerning respondent's operation and supportive of their agreement are not disputed by petitioner. She says in her statement on page 5, "The evidence in this case is largely undisputed and such minor variations as exist are basically immaterial." She then recites respondent's complaint to the union, request for a change of crew, on the theory

that counter employees were either embezzling cash, failing to charge proper prices, particularly to friends, giving too large portions of food or otherwise mishandling food or money—which complaint as to a bad operation continued until the union made an investigation of respondent's books and ultimately that the union entered into an agreement with the company concerning the layoffs which culminated in discharge. She recites no incident where facts were misstated by the Court of Appeals.

There is therefore no basis whatever for petitioner's contention that the Court of Appeals misstated the facts in its opinion on the first appeal (page 10), nor for the statement (pg. 12) that it was conceded at all times by both the union and the company that the bad operation might not be due to any misconduct on the part of counter employees, nor for the contention (page 14) that the jury could have decided the entire defense was a sham. Certainly, there is no basis for petitioner's contention (page 16) that "It follows as a matter of law that the union acted arbitrarily and in bad faith." Petitioner never alleged any arbitrary action, bad faith or fraud on the part of the union or a failure to properly represent its membership, nor any collusion between the union and the respondent. Certainly, there was no testimony to indicate bad faith on the part of the union or collusion between union and the employer. Those are matters of insinuation and innuendo which permeated all of the trials of this cause, founded only on extravagant claims of petitioner as to what might have been and not upon what was done.

Returning to the claim that the Court of Appeals exceeded its authority in affirming judgment for a directed verdict, and that its conduct comes within the disapproval of this court in the light of *Slocum v. New York Life Insurance Company* and *Baltimore and Carolina Line v. Red-*

man, respondent is unable to see the application of those cases here. If anything, they are favorable to respondent's position. In *Galloway v. United States*, 319 U.S. 372, 87 L. Ed. 1458, where the Seventh Amendment to the Federal Constitution was held not to deprive the Federal Courts of the power to direct a verdict, it was said at page 389:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently this practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; *Berry v. United States*, 312 US 450, 85 L ed 945, 61 S.Ct 637. The objection therefore comes too late."

Rule 50 of the Federal Rules of Civil Procedure gives the right to Federal Courts to direct a verdict. Respondent will rely upon that right and also the finding of the District Court that:

> "The testimony submitted by both parties to this suit on this trial is substantially the same as the testimony submitted on the previous trial and the trial before that. All of the contentions made by the plaintiff in this case were considered by the Court of Appeals on appeal of judgment entered in the prior trial * * *" (16a).

and again

> "Therefore, on the evidence submitted on the prior trial, which I have already mentioned, is substantially the same as evidence submitted on this trial, and there has been no evidence here by counsel to point out wherein there is any difference with respect to the evidence" (17a).

II.

THE COURT OF APPEALS DID NOT DECIDE A FEDERAL QUESTION IN CONFLICT WITH THE DECISIONS OF THIS COURT.

It seems to be the contention of petitioner here that the union and company agreed that employees could be discharged without just cause. This was clearly not the agreement. The agreement was that petitioner and other employees could properly be discharged for just cause in accordance with the collective bargaining agreement under the existing circumstances. There was no modification of the collective bargaining agreement here. It was interpreted by the parties thereto in the light of the circumstances after a condition arose which called for their interpretation of the "just cause for discharge" clause in the absence of specific definition. The Court of Appeals in its first opinion found that it was within the authority of the union as bargaining agent to so agree with defendant.

In arriving at its decision, the Court of Appeals was careful to point out its awareness of the authorities which have held that the collective bargaining agent's authority does not extend to a retroactive determination that a discharge was for just cause or to the waiver or settlement of an existing grievance, citing *Elgin, Joliet & Western Railway Co. v. Burley*, 325 U.S. 711, 761, 89 L. Ed. 1886, and other cases.

Here there was nothing in the way of a retroactive determination of existing rights. Respondent comments only parenthetically that the Burley case was decided in the light of the rights of notice and appearance or representation given to railroad employees by the Railway Labor

Act of 1934, which rights were held to be separate and distinct from those which the collective agent may have had to represent the collective interests. Here, contra to claim by petitioner, there was no change of an existing agreement with retroactive effect upon accrued rights.

With reference to the matter of fair play and petitioner's question of how the agreement of the union in the instant case could possibly be in the interest of all its members, or any of them, respondent points to what it considers to be the unassailed integrity of the union in finally agreeing that an employer need not be deprived of its right to operate a business nor saddled permanently with a disastrous operation resulting from employee inefficieney or worse. Insistence by the Union that inefficient or dishonest employees could not be discharged for just cause might please the employees involved but would be unfair to other members of the union who may be presumed to possess requisite competency and efficieney for their work. It would not be conducive to good faith collective bargaining.

III.

THE COURT OF APPEALS DECIDED THE MATTER OF STATE LAW IN ACCORDANCE WITH THE LAW OF THIS STATE.

In Michigan, an employee has no inherent right to seniority or employment except as provided in contracts entered into and rules adopted by the employer relating thereto. *Ryan v. New York Central R.R. Co.*, 267 Mich. 202; *Hartley v. Brotherhood*, 283 Mich. 201; *Zdero v. Briggs Mfg. Co.*, 338 Mich. 549; *Holman v. Industrial Stamping and Mfg. Co.*, 334 Mich. 235; *Cortez v. Ford*

Motor Company, 349 Mich. 108; *Knight-Morley Corporation v. Employment Security Comm.*, 350 Mich. 397.

In Michigan, an employer has the right to discharge an employee at will unless such right is restricted or qualified by contract or statute. *Lynas v. Maxwell Farms*, 279 Mich. 684; *Cortez v. Ford Motor Company, supra.*

In *Cortez v. Ford Motor Co.*, 349 Mich. 108, which was an action against the Ford Motor Company, an international union and Ford Local No. 600 (UAW-CIO) and an individual who was the president of the Dearborn Stamping unit of Ford Local No. 600, the court said, at pages 120-121:

> "The essence of plaintiffs' complaint is really that the union failed to accept plaintiffs' position upon this grievance, namely, that each of them was, under the seniority provisions of the contract, entitled to a job at all of the times concerned, and failed to urge it upon the company through all the steps in the grievance procedure. There is no promise of this nature contained in the contract. On the contrary, the contract makes amply clear that union representatives have discretion to receive, pass upon and withdraw grievances presented by individual employees.
>
> "Our Court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representatives of the union, subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud. *Hartley v. Brotherhood of Clerks, supra; Zdero v. Briggs Manfg. Co., supra.* The United States Supreme Court has held the exercise of such discretion authorized by the labor management relations act of 1947 (29 USCA, Sec. 141 *et seq.*)" citing *Ford Motor Co. v. Huff-*

man, 345 U.S. 330, 337-339 (73 S. Ct. 681, 97 L. Ed. 1048).

Further in its opinion, the Court stated at pages 123-124:

"We do not believe under the pleadings and record currently before us that plaintiffs state a cause of action in assumpsit as third-party beneficiaries against the defendant International Union CIO, or Local 600 UAW-CIO, or Archie Acciacca."

"In this regard, we are mindful of the fact that individual members of the union may, under certain circumstances enforce fair and proper representation of their interests on the part of their union representatives by legal action. The union's duty of fair representation is founded upon the relationship between the union and the members as recited in the constitution and bylaws of the organization, *Ryan v. New York Central R. Co., supra; Harltey v. Brotherhood of Clerks, supra*, or in the duty imposed upon the union of fair representation by State or Federal labor statutes. *Steele v. Louisville & Nashville R. Co.*, 323 US 192 (65 S. Ct. 226, 89 L ed 173); *Brotherhood of Railroad Trainmen v. Howard*, 343 US 768 (72 S Ct 1022, 96 L ed 1283); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 US 232 (70 S Ct. 14, 94 L ed 22).

"No such case is before us. Since this count is founded entirely upon assumpsit, the cases which deal with the union's violation of its constitutional obligation to its members, or its obligation under the State and national labor acts, are not in point."

SUMMARY—CONCLUSION

Respondent respectfully prays that petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted.

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